In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-877

RICHARD R. HORTON, ET AL.,
Appellants,

VERSUS

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; E. RAY LONG, City Clerk of the City of Oklahoma City, Oklahoma; ARNE LOVEN, City Treasurer of the City of Oklahoma City; and M. A. SWATEK AND COMPANY, an Oklahoma Corporation,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

BILL PIPKIN and
WILLIAM C. LEACH
110 West Main
Moore, Oklahoma 73160

By WILLIAM C. LEACH

Counsel for Appellants

December, 1977

UTTERBACK TYPESETTING CO., 819 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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INTRODUCTORY PARAGRAPH

The appellants to this action are as follows: Richard R. Horton, C. Susan Horton, Hugh P. Haugherty, Mary L. Haugherty, Luther K. Pitts, Florene Pitts, Oda R. Platt, Esther M. Platt, Charles R. Seitsinger, Augusta E. Seitsinger, Shirley Smith, Donald L. Smith, R. Bruce Holman, Mike McGowan, Patricia L. Burford, Lorene Houx, Charles D. Smith, Roselynn S. Smith, David Kay, Ronald Pickett, and Linda Pickett.

This appeal by appellants is from an Order of the Supreme Court of the State of Oklahoma, dated May 10, 1977, and an Order dated July 22, 1977, denying appellants' Petition for Rehearing; and they submit this Jurisdictional Statement to show this Court has jurisdiction of the appeal and that a substantial question is presented.

CITATIONS TO OPINIONS BELOW

The Supreme Court of Oklahoma reversed an Order of the District Court of Oklahoma County which issued a permanent injunction enjoining the City of Oklahoma City, its contractor, and its officers from making assessments against property within a sewer district for improvements constructed in the district, because the City lacked jurisdiction to make such improvements due to the fact that notice required by statute was not given. The District Court permanently enjoined the City of Oklahoma City, its officials, agents, and employees from compiling, certifying, levying, or collecting any assessment or tax, against the property of appellants, in order to pay the cost of the sanitary sewer line serving said Sewer District No. 1183; and permanently enjoined appellee, Oklahoma City, and appellee, M. A. Swatek & Company from issuing, printing, selling, receiving, or negotiating any special or local improvement bond, secured by assessments levied against the real property situated in said Sewer District No. 1183.

The Supreme Court of Oklahoma in reversing the Order of the District Court said:

> "Because neither the applicable statutes nor the Due Process Clause of the United States Constitution, re-

> quires that landowners be given notice of a governmental body's approval of preliminary plans, estimates, and plats, in the creation of a sewer district, when the district is initiated by a landowner's petition, we reverse the Order of the trial court which held that notice was required and set aside the injunction issued by the Court."

JURISDICTION

This suit is one to enjoin appellee, the City of Oklahoma City, from assessing or taxing appellants' property for the reason that proper notice was not given according to the Statutes of the State of Oklahoma, thereby denying due process contrary to Article VI, Amendment V of the United States Constitution.

This appeal is taken under 28 U.S.C. § 1257(2), to-wit:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

The judgment of the Supreme Court of Oklahoma was rendered on May 10, 1977.

A Petition for Rehearing was filed on May 25, 1977, and denied by the Supreme Court of Oklahoma on July 22, 1977.

The Journal Entry of Judgment was entered by the trial court on May 26, 1976.

STATUTES INVOLVED

The State Statutes involved are as follows:

Title 11, Oklahoma Statutes, 1971, Section 270.6 *et seq.*,

> " * * * The governing body shall cause sewers and/or district distribution lines to be constructed in each district whenever the record owners of more than one-half (½) the area of the land liable to assessments for said improvement shall petition therefor. * * * "

Title 11, Oklahoma Statutes, 1971, Section 270.29,

> "This act shall not repeal any other law relating to the subject matter hereof, but shall be deemed to provide a supplemental, additional, and alternative method of procedure for the benefit of the cities and towns of this State."

Title 11, Oklahoma Statutes, 1971, Section 270.10,

" * * * Said resolution shall be published for at least two consecutive Thursday issues, if published in a daily newspaper, which newspaper shall be of general circulation in said city or town. Such notice shall further provide that if the record owners of more than one-half in area of the land to be assessed shall not within fifteen (15) days after the last publication thereof, file with the Clerk of said incorporated city or town, their protest in writing against the improvement, then the incorporated city or town shall have the power to cause such improvement to be made and contract therefor and to levy assessments for the payment thereof; provided that after the same shall have been protested by the owners of more than fifty percent of the land liable to assessment the governing body of said incorporated city or town shall not advertise the same again for a period of six months except upon petitions as heretofore provided. In addition to the

publication notice prescribed by statute in the creation of a local improvement district or special assessment district by a town, city, county or district, notice by mail shall be given as hereinafter provided:

"Not less than ten days before the first hearing affecting the proposed district, the town, city, county or district clerk, as the case may be, shall notify each listed owner of land as shown by the current year's tax rolls in the County Treasurer's office, said list to be furnished by the engineer, by mailing a postal card directed to said owner at his last known address as shown by said ownership list, stating the initiation of the proceedings and that the property, describing it, will be liable to assessment to pay for the improvement naming the newspaper and the issues thereof in which the resolution prescribed by statute is to be published and referring the owner to each publication for further particulars. Provided, that failure to receive such notice shall invalidate the proceedings affecting said district. If several tracts are owned by the same person, all may be included in the same notification. Provided, that in lieu of a mailing of the aforesaid postal card, that said Clerk may mail to each of said owners a copy of the newspaper publication which mailing shall not be less than ten days before the first hearing. Proof of notification shall be made by affidavit of said clerk and filed in his office."

Title 11, Oklahoma Statutes, 1971, Section 270.27,

> "No suit shall be sustained to set aside any assessment, or to contest the area of assessment, or to enjoin the governing body of any city or town from levying or collecting any such assessment, or installment thereof, or interest or penalty thereon, or issuing the bonds, or providing for their payment or contesting the validity thereof on any ground, or for any reason, other than for the failure of such governing body to

adopt and publish the resolution declaring the necessity for such improvements and the publication thereof as provided in Section 10 of this Act (Section 270.10), and to give notice of the hearing on the assessment roll unless such suit shall be commenced not more than fifteen (15) days after the publication of the ordinance levying assessments, and no suit shall be sustained after the work has been completed and accepted by such city or town, except for failure to give such notice of the preliminary resolution of necessity or the failure to give the notice of the hearing on the assessment roll; and provided, further, that in the event any special assessment shall be found to be invalid or insufficient, in whole or in part, for any reason whatsoever, the governing body may at any time in such manner provided for levying an original assessment proceed to cause a new assessment to be made and levied which shall have like force and effect as an original assessment."

Title 11, Oklahoma Statutes, 1971, Section 270.14.

"After the expiration of the time for objection or protest on the part of the property owners, or if insufficient protest be filed, the governing body of said incorporated city or town shall adopt a resolution or motion declaring that no such protest has been filed, or that such protest, if filed, was insufficient, as the case may be, and expressing the determination of such governing body to proceed with the improvement. Such resolution shall require the engineer to forthwith submit and file detailed plans, profiles, specifications, and estimates of probable costs. * * * "

QUESTION PRESENTED

Is there a denial of equal protection of the law in violation of the Fourteenth Amendment and the Fifth Amendment to the United States Constitution denying appellants due process when an Oklahoma Statute requires jurisdictional procedural notices when such notices were not given as required?

STATEMENT OF THE CASE

On April 30, 1974, appellee, E. Ray Long, City Clerk of the City of Oklahoma City, received a petition signed by nine (9) property owners requesting the City of Oklahoma City create a sanitary sewer assessment district to serve Lots 19 thru 35 of the Powers Addition to Oklahoma City, and as a result thereof, Sewer District Number 1179 was created by the City Council of the City of Oklahoma City on March 11, 1975, and after approving final plans and specifications, competitive bids were solicited by advertisement. Bids were regularly received. However, the sewer improvment district was cancelled by the City Council when bids exceeded the City Engineer's estimate.

Based on the same petition, the City Council of the City of Oklahoma City, on May 6, 1975, created a second sanitary sewer district, No. 1183, under the following, but not all inclusive, procedure:

1. On May 6, 1975, the City Council of the City of Oklahoma City adopted a Resolution determining the petition filed on April 30, 1974, to be proper and sufficient as required by law.

2. Also on May 6, 1975, the City Council adopted Ordinance No. 14,117, which created and established Sanitary Sewer Improvement District No. 1183 to serve Lots 19 thru 35, Powers Addition to the City of Oklahoma City.

3. The City of Oklahoma City further on May 6, 1975, adopted a Resolution which acknowledged receipt of preliminary plans, preliminary assessment plat, the City Engineer's preliminary estimate of cost, and directed the City Engineer to prepare final plans and estimates for Sewer District 1183.

4. Also, on May 6, 1975, the City Council adopted another Resolution which approved and adopted final plans and specifications for the construction costs and directed the City Clerk to advertise for competitive bids.

5. E. Ray Long, City Clerk of the City of Oklahoma City, thereafter, advertised for bids in a legal publication, and in response thereto, appellee M. A. Swatek and Company submitted its bid in proper form in an amount below the final estimate of the City Engineer and was thereby, on June 24, 1975, awarded the construction contract.

The contracts were signed, bonds received, and the sanitary sewer pipeline installed according to plans and specifications, same being approved and accepted by appellee, the City of Oklahoma City.

6. The City Council of the City of Oklahoma City, on December 30, 1975, approved the construction cost, directed the City Engineer to prepare an assessment roll for that real property situated and improved by the district, adopted a Resolution to accept the assessment roll for Sewer District No. 1183, and established January 13, 1976, as the hearing date to hear objections to the apportionment of the costs to the property benefited, notice was published and sent by U.S. Mail to the affected property owners.

7. The Assessment Roll hearing began on January 13, 1976, and then continued until February 10, 1976, before the City Council of the City of Oklahoma City. This hearing was subsequently continued again, and on February 24, 1976, the City Council adopted a Resolution confirming and approving the Assessment Roll for Sewer District No. 1183, as originally prepared and submitted by the City Engineer of the City of Oklahoma City.

8. On March 9, 1976, the City Council passed a Resolution approving the work and materials supplied by M. A. Swatek and Company and accepted the improvement on behalf of the City of Oklahoma City, and on March 21, 1976, the City Council approved an Ordinance assessing the cost of construction for Sewer District No. 1183 against the property benefited.

In the "Supplement to Stipulations," dated May 14, 1976, and filed in the District Court of Oklahoma County, the parties stipulated that Exhibit "G" or Resolution No. 2, passed and approved by the City Council of Oklahoma City on May 6, 1975, adopting the preliminary plans, preliminary estimate of cost of the sewer line authorized by Sewer District No. 1183, was never published in any newspaper or that any notice was ever mailed to any record property owner of the property to be assessed that they had 15 days after the last publication to file a protest in writing against such improvement. No proof of notification by mail to said

record property owners in the form of an affidavit was prepared by appellee, E. Ray Long, City Clerk of the City of Oklahoma City, or any of his deputies or employees and filed in his office.

On April 1, 1976, appellants filed a petition in the District Court of Oklahoma County, with an affidavit attached, seeking injunctive relief from sewer district assessments about to be made by appellee, the City of Oklahoma City. A restraining order was issued and timely served on all appellees directing them to appear on April 9, 1976, at 2:00 o'clock p.m. to show cause why a permanent injunction should not be issued.

Thereafter, the parties filed motions for summary judgment, entries of appearance, answers, and certain stipulations, which eliminated the necessity of oral evidence to establish applicable facts.

The hearing on the restraining order was passed at the request of the parties and merged with the final hearing held on May 28, 1976, wherein the trial court entered a permanent injunction against appellees enjoining them from collecting any assessment or issuing any special or local improvement bonds affecting appellants' real property as a result of Sanitary Sewer Improvement District No. 1183. Appellees timely appealed the ruling of the trial court to the Supreme Court of Oklahoma. The record designated to be considered was all pleadings and instruments filed of record in the trial court.

THE FEDERAL QUESTION IS SUBSTANTIAL

The issue involved in this appeal is of general public interest. Numerous other Oklahoma property owners will be affected and are greatly concerned with the ruling of the Supreme Court of Oklahoma and are adversely and gravely affected thereby. In all probability, many property owners so harmed are not economically able to present their objections nor are they aware of the procedure prescribed by the Oklahoma Legislature. The ramifications of the opinion and judgment of the Oklahoma Supreme Court are of critical importance, to-wit: To what extent may a City enact assessment or taxation against property owners when said property owners are not given notice, as required by statute wherein they may protest such assessment and taxation? For these reasons, the question presented is so substantial as to require plenary consideration of this Court, with briefs on the merits and oral arguments for its resolution.

During trial in the District Court of Oklahoma County, it was stipulated by the parties in paragraph three (3) of the "Supplement to Stipulations" as follows:

> "(3) Exhibit 'G' to the Stipulations (Resolution 2) was never published in any newspaper, nor was any notice ever mailed to any property owners of the area to be assessed, which is Lots 19 thru 35 of the Powers Addition to Oklahoma City, Oklahoma, notifying them that they had fifteen (15) days after the last publication to file with the City Clerk of Oklahoma City, Oklahoma, their protest in writing against said improvement and no notification by mailing in the form of an affidavit has been prepared by the Clerk of the

City of Oklahoma City, or any of his deputies or employees and filed as provided in Title 11, O.S., 1971, § 270.10."

Appellants contend that the applicable statutory requirements of 11 O.S. 1971, § 270.1, *et seq.*, are required to be followed by the City of Oklahoma City, before appellants can be assessed for Sanitary Sewer Improvement District No. 1183. Appellants submit that they were denied due process by not having the opportunity to protest the improvement district and to know the preliminary cost of assessment plats.

This Court's attention is called to the case of *Lance* v. *City of Sulphur*, Okl., 503 P.2d 867, which is the same issue as the case at bar. Judgment in the trial court was rendered for the City of Sulphur by sustaining a demurrer to the evidence, and from the adverse ruling, the property owners appealed to the Oklahoma Supreme Court, which reversed and remanded the trial court's decision.

Must the governing body of the city or town give the notices and publications required by Title 11, O.S. 1971, Section 270.10, to create a valid improvement sewer or water distribution system? The only difference between the case at bar and the case of *Lance* v. *City of Sulphur* is in the *Lance* case the City of Sulphur created the district without petition. In an exhaustive opinion written by Mr. Justice Davison, the Supreme Court of Oklahoma stated in the *Lance* v. *City of Sulphur*, supra, as follows, to-wit:

"Nevertheless, the City Commissioners, did, on November 7, 1967, pass and approve Ordinance No. 724, which was duly signed by the Mayor.

"The Ordinance (1) declared necessity for the construction of Sanitary District No. 36, and described the property to be served, (2) declared that the consulting engineer for the City of Sulphur be directed to prepare plans, profiles, and specifications for the district, with an estimate of the cost thereof, and file the same with the City Clerk, (3) provided that the Commissioners shall enter into a contract for the construction of the district improvements under the approval and adoption of the plans, profiles, and specifications and estimate and ordered that the payment of the whole cost of the project be apportioned, levied, and assessed in the manner provided by law against lots, pieces, and parcels of land benefited thereby comprising the sanitary sewer district, and (4) declared an emergency.

"The contents of Ordinance No. 724 were published once (November 6, 1967) in the Sulphur-Times-Democrat.

"Notice to Contractors was published on April 10, 17, and 24, 1969, in the same newspaper, * * *. The City of Sulphur accepted the bid of Nelson Construction Company and entered into a construction contract with that company, under date of July 22, 1969. * * *

"According to the record, no notice or information of any kind, including the required resolution of approval of the plans, was transmitted to the property owners, either by publication or by mail, after the enactment of Ordinance No. 724, until August, 1970. This was after the completion of the projected Sanitary Sewer District No. 36. * * *

"Most, if not all of the property owners in the proposed sanitary sewer district were interested in the establishment of the district, but not at any price. Although the existing use of septic tanks was creating problems in sanitation, the property owners retained

a vital concern over the size of the assessments to be levied against their property. * * *

"Under 11 O.S., 1961, § 270.10 (Supp. 1963) the publication of the creative ordinance is not the only jurisdictional requisite. Upon the approval, by resolution, of the preliminary plans for the sewer district, and preliminary estimate and assessment plat and the declaration that the work of improvement is necessary to be done, the resolution shall be published for two successive weeks in a newspaper of general circulation in the city or town. The publication of the resolution shall further provide: 'That if the record owners of more than one-half in area of the land to be assessed shall not within fifteen (15) days after the last publication thereof, file with the Clerk of said incorporated city or town, their protest in writing against the improvement, THEN THE INCORPORATED CITY OR TOWN SHALL HAVE THE POWER to cause such improvement to be made and contract therefor and to levy assessment for the payment thereof; * * *.' (Emphasis supplied) The legislative intention to make the publication of such resolution containing the warning to property owners in the proposed sewer district, a jurisdictional step in the creation of the City's power, is clearly evidenced by this language. This requisite notice was not given to the property owners either by publication or by mailing. * * *

"We deal here with a statutory plan which compels property owners to pay for the construction of the sanitary sewer district. Procedures designed for their protection must be strictly construed in favor of the property owners. Accordingly, in Bonney vs. Smith, 194 Okl. 106, 147 P 2nd 771, 773, we said:

> 'Since the creation of these districts and the apportionment of the cost thereof to the properties affected is not an inherent power that can be exercised by municipalities in the absence of statutory grants of power and since it is generally held that statutory grants of such power must be explicit and must be strictly construed, and must be strictly applied against the exercise of the power in any manner save in the most literal sense within the meaning of the language of the statutes, American-First Nat. Bank vs. Peterson, 169 Okl. 588, 38 P 2nd 957, we cannot overlook the failure to publish this ordinance on the theory it was an emergency ordinance.'

"See also, American First National Bank of Oklahoma City vs. Peterson, 169 Okl. 588, 38 P 2nd 957. Here there was no publication of the required resolution of adoption and approval of the preliminary plans, the preliminary estimate and the assessment plat and the warning to property owners. * * *

"When Nickerson and City of Coalgate were decided all that was necessary to confer power upon a municipality to create a sewer district was the enactment of the creative ordinance and its publication. As late as 1971, we reiterated in Hamilton vs. The Town of Valley Brook, Oklahoma, et al., Okl. 487 P 2nd 708, 711, what we recognized in Nickerson, City of Coalgate and other cases when, quoting from Decker vs. Ponca City, et al., Okl., 361 P 2nd 195, we said:

> 'Where jurisdiction is conferred upon a municipal body to provide for paving its streets, and charge the cost thereof against the property benefited, according to the method provided by law, a property owner who stands by while such work is being prosecuted, with full knowledge that large expenditures are being made for such improvement which will benefit his property, will not, after the work is completed, be afforded relief by injunction against assessments levied against the property benefited to pay for such work.'

"But here jurisdiction was not conferred. There was no publication (publication in two successive Thursday issues was required) of a resolution approving the preliminary plans, preliminary estimate and assessment plat and containing a notice that the City of Sulphur shall have the power to cause the improvement to be made if within 15 days from the last publication the record owners of more than one-half in area of the land to be assessed do not file their protest in writing against the improvement. The requisite resolution of the City's legislative body containing the statutorily required notice to property owners did not receive the requisite publication. * * * Obviously, the publication of the resolution of adoption and approval of the plans, specifications, estimates, and assessment plats was to give notice to property owners and to set the time running within which the property owners could exercise their right to contest the action of the City. * * * We reiterate our holding that the publication of information is jurisdictional, which information is necessary to enable a property owner to timely file the statutorily prescribed action to question the City's adoption and approval of plans and proposed assessments for the creation of a sanitary sewer district. The publication of the required information did not occur. * * *

"Since we hold that the Appellee, City of Sulphur, did not take the steps necessary to acquire 'the power to cause such improvements to be made and contract therefor and to levy assessments for payment thereof' the judgment of the trial court is reversed and remanded."

The Legislature by the terms of 11 O.S. 1971, § 270.27, supra, specifically expressed the importance of giving the notices required in Section 270.10 by providing an injunction or other type suit could be brought at any time for the failure to give the notices required.

The record of the proceedings in Sewer District No. 1183 also fails to reflect a compliance with Section 270.14 because there was no time given for protest. Resolution No. 2 (adopting Preliminary Plans, Estimate of Costs and Assessment Plat) was adopted on May 6, 1975, and Resolution No. 3 (approving Final Plans, Profiles, Specifications and Estimates of Probable Costs) was also adopted on May 6, 1975, which would not allow a delay for any person to file an objection. Even those persons filing the petition might file an objection when they are informed by the preliminary estimate and assessment plat that the costs may be in excess of what they might have been informed or thought the cost to be. 11 O.S. 1971, § 270.22, supra.

It should also be noted that Section 270.13 confers upon any property owner (even those signing the petition) the right to institute an action to contest the approval and adoption by the City of the plans, specifications, estimates, and assessment plats.

Not all the appellants signed the petition that caused the improvement district to be created; however, all persons should be notified of the estimated cost and assessment plat of said improvement district.

CONCLUSION

For the foregoing reasons, Appellants' appeal from the Opinion and judgment below should be granted.

Respectfully submitted,

BILL PIPKIN and
WILLIAM C. LEACH
110 West Main
Moore, Oklahoma 73160

By WILLIAM C. LEACH

Counsel for Appellants

December, 1977

CERTIFICATE OF MAILING

I hereby certify that on the ..... day of December, 1977, I mailed true and correct copies of this Jurisdictional Statement to Walter M. Powell, Municipal Counselor, Attorney for the City of Oklahoma City, E. Ray Long, and Arne Loven, 309 Municipal Building, Oklahoma City, Oklahoma 73102; and Buck and Crabtree, Attorney for M. A. Swatek & Co., 2500 Liberty Bank Tower, 100 Broadway, Oklahoma City, Oklahoma 73102.

.....
William C. Leach

APPENDIX A

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY 10 1977
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RICHARD R. HORTON; C. SUSAN HORTON; HUGH P. HAUGHERTY; MARY L. HAUGHERTY; LUTHER K. PITTS; FLORENE PITTS; LORENE HOUX; GEORGE W. BAILEY; C. R. ELLIS; BEULAH C. ELLIS; DONALD WAYNE FULLER; FAYE DARLENE FULLER; CHARLES R. SEITSINGER; AUGUSTA E. SEITSINGER; PATRICIA L. BURFORD; ODA R. PLATT; ESTHER M. PLATT; CHARLES D. SMITH; ROSE-LYNN S. SMITH; DONALD L. SMITH; SHIRLEY A. SMITH; R. BRUCE HOLMAN; and MIKE McGOWAN,	)	
Appellees,	)	
-vs-	)	No. 49,857
CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; E. RAY LONG, City Clerk of the City of Oklahoma City, Oklahoma; ARNE LOVEN, City Treasurer of the City of Oklahoma City; and M. A. SWATEK AND COMPANY, an Oklahoma corporation,	)	
Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY

Honorable Jack R. Parr, Trial Judge.

This appeal is from an order of the District Court which issued a permanent injunction, enjoining the City of Oklahoma City, its contractor, and its officers from making assessments against property within a sewer district for improvements constructed in the district, because the City lacked jurisdiction to make such improvements due to the fact that notice required by statute was not given.

Holding that the particular statutory requirement of notice was not applicable to cases in which the creation of a sewer district is initiated by a landowner's petition, and also holding that the Due Process Clause of the United States Constitution does not require notice prior to the construction of improvements in an assessment district, we reverse the decision of the trial court.

REVERSED

Bill Pipkin and
William C. Leach
Moore, Oklahoma — For Appellees.

Walter M. Powell, Municipal Counselor
Giles K. Ratcliffe, Asst. Municipal Counselor
Marion Jowaisas, Asst. Municipal Counselor
Oklahoma City, Oklahoma — For Appellants.

DAVISON, J.:

In March, 1975, the City Council of Oklahoma City received a petition signed by the owners of more than one-half of the area composed of lots 19 thru 35 in Powers Addition in Oklahoma City, Oklahoma. The petition asked the City to establish a sewer district composed of lots 19 thru 35 in Powers Addition and to construct a sanitary sewer system in that district.

On March 11, 1975, the City Council duly and regularly adopted a resolution finding that the petition of the property owners was sufficient and was properly signed by the owners of more than one-half of the land area liable for assessment.

On that same date, the City Council by ordinance established Sewer District No. 1179 to serve lots 19 thru 35 inclusive. Public notice of passage of the ordinance creating the district was properly published. Subsequently, an ordinance establishing Sewer District No. 1179 was repealed because all bids received by the City for the construction of the sewer system in the district substantially exceeded the City Engineer's estimates.

On May 6, 1975, the City Council once again passed a resolution determining that the petition of the homeowners was sufficient, and passed an ordinance creating a sewer district to serve lots 19 thru 35 in Powers Addition, Sewer District No. 1183. The ordinance creating the new sewer district was published as required by law. Upon the creation of the new district, the Council duly and regularly adopted a resolution acknowledging receipt of the preliminary plans, preliminary assessment plats, and the City Engineer's preliminary estimates of costs for construction of sewer lines in the district.

Additionally, on May 6, 1975, the City Council also passed a resolution adopting and approving the final plans and specifications for the construction of a sewer system in Sewer District No. 1183. *No notice of the approval of the plans and estimates was published.*

Bids for the sewer construction were properly solicited through publication, and the contract awarded to M. A. Swatek and Company. M. A. Swatek and Company performed all required of them under the construction contract and properly installed and completed the sewer system in accordance with the approved plans and specifications.

After the completion of the construction, the City Engineer prepared and filed a final statement of construction costs for the project, and on December 30, 1975, the City Council duly and regularly adopted a resolution evidencing receipt and approval of the final estimate of costs, and directed the City Engineer to prepare an assessment roll. At that time, the City Council adopted a resolution indicating receipt of the assessment roll and set a time and place for a hearing to consider objections to the apportionment of costs to the property benefited. Notice of the hearing date on the assessment rolls for the sewer district was duly and regularly published and notice was given to all property owners subject to assessment.

Some of the landowners in the sewer district, including some landowners who had signed the petition initiating the creation of the sewer district, brought an action in District Court seeking to enjoin the City of Oklahoma City, its officers, and contractor, from assessing, levying or charging any special sewer tax, or compelling in any way, the payment that might be due for construction in Sewer District No. 1183. The trial court to whom the case was tried on a stipulated set of facts, held that the property owners, because of the provisions of 11 O.S. 1971 § 270.10, were entitled to notice when the City Council approved the preliminary plans, specifications and plats for the construction in the sewer district, and that the failure to give such notice was a jurisdictional defect. Accordingly, the court issued a permanent injunction. Appellant City, its officers and contractor have perfected an appeal from the trial court's ruling. The issue presented in the appeal is:

> In a proceeding for the creation of an assessment district to pay the cost of local sewer improvements under the provisions of 11 O.S. 1971 §§ 270.1 thru 270.29, is a governing body of the assessing authority required to give the notice to property owners provided for in 11 O.S. 1971 § 270.10, where a written petition for the improvement, signed by the property owners, has been filed with the assessing authority and the governing body has found said petition to be sufficient?

Under the provisions of 11 O.S. 1971 §§ 270.1 thru 270.29, there are two procedures under which a sewer or water district can be initiated—by landowners' petition, or by direct action of a governing body. Section 270.6 provides for the initiation of such district through a landowners' petition. That Section provides:

> "District sewers and district water distribution lines shall be established within the limits of the districts, to be prescribed by ordinance. District sewers shall connect with public sewers or other district sewers, or with the natural course of drainage, as each case may be. District water distribution lines in contiguous or non-contiguous areas may connect with public distribution lines, or other district distribution lines. The governing body shall cause sewers and/or district water distributon lines to be constructed in each district whenever the record owners of more than one-half (½) the area of the land liable to assessments for said improvement shall petition therefor. Said districts may include mains and sub-mains where the same are within the limits of the district or are necessary outlets or supply lines thereto. The cost of such district sewers and district water distribution lines, including said mains and sub-mains, shall be assessed and collected as hereinafter provided; the cost of such district sewer shall be assessed and collected as hereinafter provided; but the city shall incur no liability for building district sewers, except when the city is the owner of a lot within the district, and in that case the city shall be liable for the costs of said sewer in the same manner as other property owners within the same district."

Section 270.8 provides for the initiation of such districts through direct governmental action. That Section provides:

> "Whenever the governing body shall deem district sewers, or district water distribution lines necessary, it may proceed with such work without petition, and shall, by resolution, require the city or town engineer, or other registered professional engineer, to prepare and file preliminary plans, showing a preliminary estimate of the cost of such improvement, and an assessment plat, showing the area to be assessed. In the event non-contiguous areas are included in the same district, separate preliminary estimates shall be filed as to each area. The governing body shall have the power to adopt any material or methods for the construction of such work."

Section 270.10 provides that when a governing body, in the creation of a sewer or water distribution district, approves, by resolution, preliminary plans, estimates and assessment plats, notice of the adoption of the resolution must be published; that statute provides:

> "*Upon the filing of said preliminary plans, preliminary estimate and assessment plat*, the governing body of such incorporated city or town shall examine the same, and if found satisfactory, *shall by resolution adopt and approve the same*, and declare such work of improvement necessary to be done. *Said resolution shall be published for at least two consecutive Thursday issues, if published in a daily newspaper, or at least two consecutive issues, if published in a weekly newspaper, which newspaper shall be of general circulation in said city or town*. Such notice shall further provide that if the record owners of more than one-half in area of the land to be assessed shall not within fifteen (15) days after the last publication thereof, file with the Clerk of said incorporated city or town, their protest in

writing against the improvement, then the incorporated city or town shall have the power to cause such improvement to be made and contract therefor and to levy assessments for the payment thereof; *Provided, that after the same shall have been protested by the owners of more than fifty per cent of the land liable to assessment the governing body of said incorporated city or town shall not advertise the same again for a period of six months, except upon petitions as heretofore provided.* In addition to the publication notice prescribed by statute in the creation of a local improvement district or special assessment district by a town, city, county or district, notice by mail shall be given as hereinafter provided: Not less than ten days before the first hearing affecting the proposed district, the town, city, county or district clerk, as the case may be, shall notify each listed owner of land as shown by the current year's tax rolls in the County Treasurer's office, said list to be furnished by the engineer, by mailing a postal card directed to said owner at his last known address as shown by said ownership list, stating the initiation of the proceedings and that the property, describing it, will be liable to assessment to pay for the improvement naming the newspaper and the issues thereof in which the resolution prescribed by statute is to be published and referring the owner to each publication for further particulars. Provided, that failure to receive such notice shall not invalidate the proceedings affecting said district. If several tracts are owned by the same person, all may be included in the same notification. Provided, that in lieu of a mailing of the aforesaid postal card, that said clerk may mail to each of said owners a copy of the newspaper publication which mailing shall be not less than ten days before the first hearing. Proof of notification shall be made by affidavit of said clerk and filed in his office." [Emphasis added]

In Lance v. City of Sulphur, Okl., 503 P.2d 867 (1972), this Court held that a governmental entity's failure to provide notice required under § 270.10 was a fatal flaw in the establishment of a sewer district, and that the flaw was jurisdictional. Accordingly, we held that the governmental entity involved, lacking jurisdiction, did not have the power to cause improvements to be made, nor to contract therefore, nor to levy assessments for the payment of such improvement. In the Lance case, supra, the process for establishing the sewer district was initiated *without petition*, whereas in the case before us, a petition was presented to Oklahoma City and found to be sufficient. Appellant City argues that the notice requirements of § 270.10 are only applicable where the process of establishing the district is initiated without petition. In support of its contention, the City points out that § 270.10 begins with the following language: "*Upon the filing of said preliminary plans, preliminary estimate and assessment plat*, the governing body * * *, shall by resolution adopt and approve the same. * * *. Said resolution shall be published. * * * " [Emphasis added].

Appellant argues that the language, "Upon the filing of said preliminary plans, etc.", can only be construed to refer to the preliminary plans, preliminary estimate and assessment plat, required under § 270.8, quoted above, which provided for the establishment of a sewer district without petition. Then, appellants note that no mention of preliminary plans, preliminary estimate, assessment plat, or their approval is made in § 270.6, which establishes the petition procedure.

Based upon this statutory structure, appellant City, its officers and contractor conclude that since the statutory provisions of § 270.6 make no mention of plans, estimate or plat, such are not required when a petition initiates the creation of a sewer district, and therefore notice of a resolution approving such estimate and plans is not required. We agree with appellant's contention. We do so for the following reasons. *First*, when a sewer district is initiated through the petition method, a governing body who receives a petition, if signed by the owners of more than one-half of the area of land liable to assessment, *must* construct sewer lines, as provided in 11 O.S. 1971 § 270.6, which provides in part:

> "The governing body *shall cause* sewers and/or district water distribution lines to be constructed in each district whenever the record owners of more than one-half (½) the area of the land liable to assessments for said improvement shall petition therefor." [Emphasis added]

Thus, when the creation of a sewer district is initiated by petition, the governmental entity, upon the filing of a sufficient petition, is granted power and has jurisdiction to construct district sewer lines, whereas when such a district is initiated without petition, jurisdiction, as we held in Lance v. City of Sulphur, supra, is not conferred until after a resolution approving the plans and estimate has been adopted and notice of the approval has been given.

Secondly, when a sewer district initiated by a petition is constructed, there is no statutory requirement that the governing body pass resolutions requesting or approving preliminary estimates and plans, whereas when a sewer district is created using the nonpetition method, such resolutions are required.

Thirdly, the language of the statute requiring notice of the passage of such resolutions is clearly limited to cases in which a sewer district is created using the nonpetition method.

Since such resolutions are not required when the creation of a sewer district is initiated by petition, there is no statutory requirement that notice be given.

In addition to arguing that § 270.10 requires notice of the City's approval of preliminary plans, estimate, and the

like, the landowners also argued that even if the statute does not provide for such notice, the lack of such notice constitutes a violation of their Constitutional right to Due Process under the Fourteenth Amendment of the Constitution of the United States, as they are entitled to notice and an opportunity to be heard before their property is taken. In addressing this due process issue, we first notice that under the provisions of 11 O.S. 1971 § 270.17, when an assessment roll is filed with a governing body, the governing body is required to set a time for holding a hearing to consider complaints or objections that may be made concerning the apportionment as to any lot involved. That Section provides:

> "When said assessment roll is filed, the governing body shall appoint a time for holding a session to hear any complaints or objections that may be made concerning said apportionment as to any of such lots. Notice of such hearing shall be published by the city or town clerk in five (5) consecutive issues of a daily newspaper, or two (2) consecutive issues of a weekly newspaper published in the county and of general circulation in said city or town, and a copy of such notice shall be mailed by the city or town clerk at least ten (10) days before such session to the owners of property chargeable with the cost of said improvement at their addresses as shown by the current year's tax rolls in the County Treasurer's office, or as shown by certificate of a bonded abstractor. The time fixed for said hearing shall be not less than five (5) nor more than thirty (30) days from the last publication. Said notice shall state that such assessment roll is on file in his office, the date of filing same, and the time and place where the governing body will hear and consider said objections. The governing body at said session, or any adjournment thereof, shall have the power to review and correct said apportionment and to raise or lower the same as to any lots or tracts of land, as they shall deem just, and shall, by resolution, confirm the same as so revised and corrected by them. At or prior to said session, any owner of real estate proposed to be assessed, may file his objections in writing against the validity of said assessment roll and proposed assessment, setting forth the nature thereof, and shall have full opportunity to be heard; and said governing body shall make such adjustments as may be just and proper. Any and all objections to the amount and validity of said assessments shall be deemed waived unless presented at the time and in the manner herein specified. The determination by the governing body of the existence and extent of special benefit to each tract or parcel of land in the district is hereby declared to be legislative in nature, and shall be conclusive upon the property owners and upon the courts."

In the statement of stipulated facts under which this case was tried, the parties stipulated that a time and place was set for an assessment hearing as required, that proper notice of the hearing was published and that the property owners involved received notice of the hearing.

In Utley v. St. Petersburg, 292 U.S. 106 (1934), the Supreme Court of the United States, in an opinion delivered by Mr. Justice Cardozo, held that due process was not denied when a municipality, with legislative power, passed a resolution to pave streets without affording property owners an opportunity to be heard in opposition of said resolution, for the Court held it is enough to satisfy due process if a hearing is provided before the imposition of the assessments to pay for the improvements. In so holding, Justice Cardozo, speaking for the Court, stated:

> "There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land (Chicago, M.St.P. & P.R. Co. v. Risty, 276

U.S. 567, 72 L.ed. 703, 48 S.Ct. 396; Londoner v. Denver, 210 U.S. 373, 378, 52 L.ed. 1103, 1109, 28 S.Ct. 708; Goodrich v. Detroit, 184 U.S. 432, 437, 46 L.ed. 627, 630, 22 S.Ct. 397), or in proceedings for collection afterwards. Hagar v. Reclamation Dist., 111 U.S. 701, 28 L.ed. 569, 4 S.Ct. 663; Winona & St. P. Land Co. v. Minnesota, 159 U.S. 526, 537, 40 L.ed. 247, 251, 16 S.Ct. 83; Wells F. & Co. v. Nevada, 248 U.S. 165, 63 L.ed. 190, 39 S.Ct. 62."

This Court has itself made similar holdings. See e.g., Hancock v. City of Muskogee, 66 Okl. 195, 168 P. 445 (1917) (Affirmed by the United States Supreme Court in Hancock v. Muskogee, 250 U.S. 454 [1919]).

Because neither the applicable statutes nor the Due Process Clause of the United States Constitution, requires that landowners be given notice of a governmental body's approval of preliminary plans, estimates and plats, in the creation of a sewer district, when the district is initiated by a landowners' petition, we reverse the order of the trial court which held that notice was required and set aside the injunction issued by that court.

REVERSED.

LAVENDER, V.C.J., DAVISON, WILLIAMS, BERRY, BARNES, JJ., concur. HODGES, C.J., IRWIN, SIMMS, and DOOLIN, JJ., dissent.

APPENDIX B

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT 11 1977
ROSS N. LILLARD, JR.
CLERK

THE SUPREME COURT OF THE
STATE OF OKLAHOMA

RICHARD R. HORTON, et al.,	)	
	)	
Appellees,	)	
-vs-	)	No. 49,857
	)	
CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation, et al.,	)	
	)	
Appellants.	)	

NOTICE OF APPEAL

Notice is hereby given that the Appellees herein hereby appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of the State of Oklahoma reversing the Trial Court's Order, said Final Order having been issued on the 10th day of May, 1977.

This appeal is taken pursuant to 28 USC § 1257 (2).

Dated this 30th day of September, 1977.

William C. Leach and Bill Pipkin
Attorneys for Appellees
110 West Main
Moore, Oklahoma 73160

s/ by Bill Pipkin

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of October, 1977, I mailed a true and correct copy of the Notice of Appeal to Walter M. Powell, Municipal Counselor, Attorney for the City of Oklahoma City, E. Ray Long, and Arne Loven, 309 Municipal Building, Oklahoma City, Oklahoma 73102; and Buck and Crabtree, Attorney for M. A. Swatek & Co., 2500 Liberty Bank Tower, 100 Broadway, Oklahoma City, Oklahoma 73102.

s/ Bill Pipkin
Moore, Oklahoma 73160

APPENDIX C

FILED IN DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JUN 25 1976
DAN GRAY, Court Clerk
BY ..... DEPUTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

RICHARD R. HORTON, et al., Plaintiffs,	)	
vs.	)	No. CD-76-380
CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation, et al., Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

Now on this 26th day of May, 1976, the above styled matter comes regularly on for hearing, before the undersigned Judge of the District Court of Oklahoma County, for final hearing on the merits; the plaintiffs appear in person and through their attorneys, Bill Pipkin and William C. Leach; the defendant, M. A. Swatek & Co., appears by counsel Jack T. Crabtree of the firm of Buck & Crabtree; the defendant, The City of Oklahoma City, a municipal corporation, and all remaining defendants appear through their attorneys, Walter M. Powell, Municipal Counselor and Russell D. Bennett, Assistant Muncipal Counselor and all parties announcing that they are ready, the Court proceeds to hear the Motions and Demurrers of the defendants and the Motions for Summary Judgment filed on behalf of both the plaintiffs and defendants.

And the Court, having heard the oral arguments of counsel on this date and at prior hearing on this matter

held on May 14, 1976, and having reviewed the files and pleadings herein, and being duly advised in the premises, Demurrer and Special Demurrer filed herein by the defendants should be, and is hereby overruled.

Further, with respect to the Motions for Summary Judgment filed by both the plaintiffs and defendants, upon examination of the files herein, the Court finds that the parties hereto entered into agreed Stipulations regarding the factual matters of this action; and upon consideration of the Stipulations filed herein on May 13, 1976 and the Supplements to said Stipulations filed herein on May 26, 1976, the Court finds that there is no substantial controversy between the parties as to any of material facts of this action; that there remains to be determined a single question of law, to-wit:

> In a proceeding for the creation of assessment district to pay the costs of local improvement under the provisions of 11 Okla. Stat., 1971, §§270.1 to 270.29, inclusive, is the governing body of the assessing authority required to give the notice to property owners provided for in 11 Okla. Stat., 1971, §270.10 where a written petition for the improvements, signed by the property owners, has been filed with the assessing authority and the governing body has found said petition sufficient?

From the Stipulations of the parties, this Court finds that Sewer District No. 1183 of the defendant City of Oklahoma City, being the assessment district that is the subject matter of this action, initiated and created by written petition of the property owners which petition was found sufficient, and was found to have been signed by the owners of more than one-half (½) of the property liable to assessment, by the governing body of the defendant, The City of Oklahoma City; and from the record herein the Court further finds that the defendant City of Oklahoma City failed to give the notice prescribed by 11 Okla. Stat., 1971, §270.10 to the property owners of Sewer District No. 1183.

As a matter of law, this Court concludes and determines that the defendant was required to give the notice provided for in 11 Okla. Stat., 1971, §270.10 even though the property owners of said Sewer District No. 1183 had filed a written petition for the improvement and the petition had been found sufficient, and had been found to be signed by the owners of more than one-half (½) of the property liable to assessment, by the governing body of the defendant, Oklahoma City; and the Court further determines that failure to give the notice prescribed by §270.10 constitutes a jurisdictional defect in the proceedings had with respect to Sewer District No. 1183 and that the defendant Oklahoma City is without jurisdiction or authority to levy or collect any assessments, or issue any assessment bonds, in order to pay the costs of the improvements benefiting Sewer District No. 1183; and therefore, the Court generally finds the issues of law in favor of the plaintiffs and against the defendants; and that the Motion for Summary Judgment filed on behalf of the plaintiffs, should be, and is hereby sustained; and the Motion for Summary Judgment filed on behalf of the defendants, should be, and is hereby, overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss, Special Demurrer, Demurrer and Motion for Summary Judgment, filed herein on behalf of all of the defendants, are hereby overruled; and it is further ORDERED that the Motion for Summary Judgment, filed herein on behalf of the plaintiffs, is hereby granted and sustained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sanitary Sewer District No. 1183 of The City of Oklahoma City, established on or about May 6, 1975, was not validly created as required by law; and that the defendant, The City of Oklahoma City, does not have jurisdiction or authority to proceed with the levy or collection of any assessment, against the property of the plaintiffs, to pay

the cost of the sanitary sewer that has been installed to serve said District No. 1183.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a permanent injunction should issue against the defendants as prayed for by the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, The City of Oklahoma City, its officials, agents and employees, are hereby permanently enjoined from compiling, certifying, levying or collecting any assessment or tax, against the property of plaintiffs, in order to pay the cost of the sanitary sewer line serving said Sewer District No. 1183; and that the defendant Oklahoma City and the defendant M. A. Swatek & Co. are hereby permanently enjoined from issuing, printing, selling, receiving or negotiating any special or local improvement bond, secured by assessments levied against the real property situated in said Sewer District No. 1183.

/s/ Jack R. Parr
JACK R. PARR
District Judge

APPROVED:

BILL PIPKIN & WILLIAM C. LEACH
By Bill Pipkin
Attorneys for Plaintiffs

BUCK & CRABTREE
By Jack T. Crabtree
Attorney for Defendant,
M. A. Swatek & Co.

WALTER M. POWELL
Municipal Counselor

By Russell D. Bennett
Russell D. Bennett
Attorneys for Defendant
The City of Oklahoma City

APPENDIX D

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY 25 1977
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RICHARD R. HORTON, et al., Appellees,	)	
-vs-	)	No. 49,857
CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation, et al., Appellants.	)	

PETITION FOR REHEARING

Come now the appellees and respectfully represent to the Court that on the 10th day of May, 1977, an opinion, order, decision, and judgment, was rendered by this Honorable Court in the above styled and numbered cause which reversed the Trial Court, and this Honorable Court should rehear and reconsider the opinion and decision for the following reasons, to-wit:

1. That said decision overlooked the question decisive of the case in regard to the time of filing of petition of landowners requesting sanitary sewer district and the fact that the same petition was used to form two (2) different sanitary sewer districts over a period of thirteen (13) months and the second district was not concluded until twenty-three (23) months after petition was filed.

2. That said decision and opinion appears to be in conflict with the express language of the controlling statute requiring notice.

3. That said decision and opinion is contrary to the intent of the legislature, which requires notice.

WHEREFORE, appellees pray that a rehearing and reconsideration of said cause be granted by this Honorable Court and withdraw the opinion or decision of May 10, 1977, and sustain the judgment, decree, and injunction issued by the trial court.

William C. Leach and Bill Pipkin
Attorneys for Appellees
110 West Main, Moore, Oklahoma 73160
by Bill Pipkin

CERTIFICATE OF DELIVERY

I hereby certify that on the 25th day of May, 1977, I mailed a true and correct copy of the Petition for Rehearing to Walter M. Powell, Municipal Counselor, Attorney for the City of Oklahoma City, E. Ray Long, and Arne Loven, 309 Municipal Building, Oklahoma City, Oklahoma 73102; and Buck and Crabtree, Attorney for M. A. Swatek & Co., 2500 Liberty Bank Tower, 100 Broadway, Oklahoma City, Oklahoma 73102.

s Bill Pipkin

APPENDIX E

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 22 1977
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Friday, July 22, 1977

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * * * * *

49,857 Richard R. Horton et al v. City of Oklahoma City. rehearing denied.

s/ Robert C. Lavender
Acting Chief Justice

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

RICHARD R. HORTON, et al.,	)	
	)	
Appellees,	)	
-vs-	)	No. 49,857
	)	
CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation, et al.,	)	
	)	
Appellants.	)	

MOTION TO STAY MANDATE

Come now the Appellees and move this Honorable Court to stay the Mandate on its Opinion issued on the 10th day of May, 1977, for the reason that the Appellees are preparing the necessary documents to lodge an appeal with the Supreme Court of the United States of America.

WHEREFORE, Appellees request this Court to stay the Mandate on its Opinion issued on the 10th day of May, 1977.

William C. Leach and Bill Pipkin
Attorneys for Appellees
110 West Main
Moore, Oklahoma 73160

by Bill Pipkin

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of August, 1977, I mailed a true correct copy of the above Motion to Walter M. Powell, Municipal Counselor, Attorney for the City of Oklahoma City, E. Ray Long, and Arne Loven, 309 Municipal Building, Oklahoma City, Oklahoma 73102; and Buck and Crabtree, Attorney for M. A. Swatek & Co., 2500 Liberty Bank Tower, 100 Broadway, Oklahoma City, Oklahoma 73102.

Bill Pipkin

APPENDIX G

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEP 26 1977
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RICHARD R. HORTON; C. SUSAN HORTON; HUGH P. HAUGHERTY; MARY L. HAUGHERTY; LUTHER K. PITTS; FLORENE PITTS; LORENE HOUX; GEORGE W. BAILEY; C. R. ELLIS; BEULAH C. ELLIS; DONALD WAYNE FULLER; FAYE DARLENE FULLER; CHARLES R. SEITSINGER; AUGUSTA E. SEITSINGER; PATRICIA L. BURFORD; ODA R. PLATT; ESTHER M. PLATT; CHARLES D. SMITH; ROSE-LYNN S. SMITH; DONALD L. SMITH; SHIRLEY A. SMITH; R. BRUCE HOLMAN; and MIKE McGOWAN,	)	
Appellees,	)	
-vs-	)	No. 49,857
CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; E. RAY LONG, City Clerk of the City of Oklahoma City, Oklahoma; ARNE LOVEN, City Treasurer of the City of Oklahoma City; and M. A. SWATEK AND COMPANY, an Oklahoma corporation,	)	
Appellants.	)	

ORDER

Mandate of this Court issued July 28, 1977 is ordered stayed of enforcement in the trial court until December 27, 1977 or pending the further order of this Court. If the appellees shall have perfected an appeal to the Supreme Court of the United States of America by December 27, 1977 then enforcement of the mandate of this Court shall be further stayed until the Supreme Court of the United States shall have finally disposed of the appeal, or until the further order of this Court.

This stay order shall not be effective nevertheless unless and until appellees shall furnish within fifteen (15) days of the date of this order an undertaking with sufficient surety approved by the Chief Justice of this Court in the penal sum of $5,000.00 conditioned upon the payment by appellees or sureties all costs and damage for delay of the appeal shall be denied, dismissed, or the judgment appealed be affirmed in whole or in part.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 26th DAY OF SEPTEMBER, 1977.

s/ Ralph B. Hodges
Chief Justice

[Certified and placed on file by the Clerk of the Supreme Court of Oklahoma the 22nd day of November, 1977.]

By Carole Streetman
DEPUTY

[Seal]

Supersedeas Bond was filed on Oct. 11, 1977, in the Supreme Court of Oklahoma per this order—appeal time was stayed until Dec. 27, 1977 to the U. S. Supreme Court.

Carole Streetman
Asst. Clerk
Supreme Court of Oklahoma

APPENDIX H

FILED IN DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JUN 25 1976
DAN GRAY, Court Clerk
BY ..... DEPUTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

RICHARD R. HORTON, et al, Plaintiffs,	)	
vs-	)	No. CD-76-380
CITY OF OKLAHOMA CITY, a municipal corporation, et al, Defendants.	)	

DESIGNATION OF THE RECORD ON APPEAL

COME NOW the defendants, The City of Oklahoma City, a municipal corporation, et al, and each of them, and hereby notify the District Court Clerk of Oklahoma County that they have commenced an appeal of the above-styled matter to the Supreme Court of the State of Oklahoma. Pursuant to the provisions of Rule 1.20 of the Rules of Appellate Procedure, defendants hereby designate for inclusion in the record on appeal to the Supreme Court of the State of Oklahoma, the following instruments and proceedings filed in the above-styled cause, to-wit:

> All pleadings, and any motions, demurrers, instruments or proceedings filed of record herein by any party to the action; *the Stipulations of the parties and any supplement*

thereto; any Briefs or Memoranda of law filed by any party; any Orders of the Court; any Journal Entry filed herein; *"and any and all instrument filed of record in this cause."*

DATED this 25th day of June, 1976.

BUCK & CRABTREE
and
WALTER M. POWELL
Municipal Counselor

By Russell D. Bennett
Russell D. Bennett
Assistant Municipal Counselor

Attorneys for the Defendants.

CERTIFICATE OF MAILING

I, Russell D. Bennett, hereby certify that a true and correct copy of the above and Designation of Record was mailed to Bill Pipkin and William C. Leach, Attorneys of record for the plaintiffs, at their address, 110 West Main, Moore, Oklahoma 73160, this 25th day of June, 1976, in the United States Mail, with postage thereon prepaid.

s/ Russell D. Bennett
Russell D. Bennett

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-877

RICHARD R. HORTON, ET AL.,
Appellants,

VERSUS

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; E. RAY LONG, City Clerk of the City of Oklahoma City, Oklahoma; ARNE LOVEN, City Treasurer of the City of Oklahoma City; and M. A. SWATEK AND COMPANY, an Oklahoma Corporation,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF OKLAHOMA

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

WALTER M. POWELL
Municipal Counselor

By: MARION JOWAISAS
Assistant Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Attorneys for Appellees

January, 1978

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-877

RICHARD R. HORTON, ET AL.,
Appellants,

VERSUS

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; E. RAY LONG, City Clerk of the City of Oklahoma City, Oklahoma; ARNE LOVEN, City Treasurer of the City of Oklahoma City; and M. A. SWATEK AND COMPANY, an Oklahoma Corporation,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF OKLAHOMA

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

Pursuant to the Revised Rules of the Supreme Court 14(2), 16-1(d) and 16-1(b), appellees move that this appeal be dismissed, or, alternatively, that the judgment of the Supreme Court of the State of Oklahoma be affirmed on the following grounds:

1. Under the Revised Rules of the Supreme Court 14(2) the appellees move the Court to dismiss the appeal

herein on the ground that said appeal was not timely prosecuted.

2. Under the Revised Rules of the Supreme Court 16-1(d) the appellees move the Court to dismiss the appeal herein on the ground that the question posed has been so foreclosed by decisions of the Supreme Court as to make further argument unnecessary.

3. Under the Revised Rules of the Supreme Court 16-1(b) the appellees move the Court to dismiss the appeal herein on the ground that the federal question posed is lacking in the necessary substantiality as a result of previous decisions by the Supreme Court having foreclosed said question.

STATEMENT OF THE CASE

On April 30, 1974, a petition was received by The City of Oklahoma City requesting the formation of a sewer district. Upon a finding that owners of more than fifty per cent of the area to be affected had joined in the petition, the City Council determined the petition to be sufficient according to law. Pursuant to OKLA. STAT. tit. 11 § 270.6 (Supp. 1977), the City Council by Ordinance 14,117 created Sewer District 1183. On the same date, the City Council adopted preliminary and final plans for the construction of said sewer district. The project was then advertised, built and accepted, all in accordance with state statutes and municipal ordinances. On March 21, 1976, the City Council approved an ordinance assessing the cost of construction for Sewer District 1183 against the property benefitted.

The appellants on April 1, 1976 filed a petition seeking injunctive relief from the sewer district assessments. The relief was granted by the District Court. The Supreme Court of Oklahoma reversed the decision of the trial court on May 10, 1977, holding, in part:

> "Because neither the applicable statutes nor the Due Process Clause of the United States Constitution, requires that landowners be given notice of a governmental body's approval of preliminary plans, estimates, and plats, in the creation of a sewer district, *when the district is initiated by a landowner's petition*, we reverse the Order of the trial court which held that notice was required and set aside the injunction issued by that court." (Emphasis added and see A-12 of Appellants' Jurisdictional Statement)

A petition for rehearing was denied by the Supreme Court of Oklahoma on July 22, 1977.

QUESTION I

Does appellants' failure to docket their appeal within the time prescribed by Rule 13(1) of the Revised Rules of the Supreme Court justify the dismissal of that appeal for want of prosecution?

Appellees move this Court to dismiss this appeal on the ground that said appeal was not timely docketed.

Rule 14(2) of the Revised Rules of the Supreme Court states:

> "2. If a notice of appeal has been filed but the case has not been docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just."

Appellants failed to docket this appeal within the time prescribed by Rule 13(1) of the Revised Rules of the Supreme Court which states:

> "1. Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, except that in the case of appeals pursuant to Section 1252, 1253, or 2282 of Title 28 of the United States Code the time limit for docketing shall be sixty days from the filing of the notice of appeal. For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored."

According to Appellants' Jurisdictional Statement at page 2, the judgments appealed from were the Order of the Supreme Court of Oklahoma of May 10, 1977 (See Appendix A-1 of Appellants' Jurisdictional Statement), and the Order of the Supreme Court of the State of Oklahoma denying rehearing, which was filed July 22, 1977 (See Appendix E-1 of Appellants' Jurisdictional Statement). Appellants thereafter gave timely notice of appeal October 11, 1977 (See Appendix B-1 of Appellants' Jurisdictional Statement).

This appeal was docketed on the 19th day of December 1977, approximately 150 days after the entry of judgment appealed from. No extension of time was asked or granted prior to the expiration of the time period prescribed by the Revised Rules of the Supreme Court; nor did any explanation accompany the untimely docketing. Therefore appellees move the Supreme Court to dismiss this appeal on the ground that it was not timely docketed in accordance with Rule 13.(1) of the Revised Rules of the Supreme Court which rule provides that the time limit for docketing the appeal shall be ninety days from the entry of the judgment appealed. See *Pittsburg Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U.S. 32, *reh. den.* 385 U.S. 995 (1966), and see *Bernard Shapiro* v. *Doe*, 396 U.S. 488, *reh. den.* 397 U.S. 970 (1970).

QUESTION II

If it has been previously decided by the Supreme Court that due process does not require the giving of notice to landowners of the formation of an assessment district, may this question form the basis of an appeal?

The appellants state:

"3. The City of Oklahoma City further on May 6, 1975, adopted a Resolution which acknowledged receipt of *preliminary plans, preliminary assessment plat*, the City Engineer's *preliminary estimate* of cost, and directed the City Engineer to prepare final plans and estimates for Sewer District 1183." (Emphasis added and see Appellants' Jurisdictional Statement, page 8)

The appellants further state that it was stipulated by the appellees that the above-mentioned Resolution "was never published . . . or that notice was ever mailed to any record property owner of the property to be assessed. . . ." (See Appellants' Jurisdictional Statement, page 9)

The appellants further attack the procedural steps taken by the City, asserting that the City did not comply with "[OKLA. STAT. tit. 11 (Supp. 1977)] 270.14 because there was no time given for protest." (See page 17 of the Jurisdictional Statement.) Failure to publish the ordinance acknowledging receipt of the preliminary plans and failure to give said notice thereof to citizens, therefore emerge as the pivotal issues.

Appellees submit that the problem is one of statutory construction. The Oklahoma Legislature drafted the pertinent statutes in contemplation that sewer districts might be

created either by the citizens themselves (herein referred to as the "petition method") or by the direct action of the City officials (referred to herein as the "resolution method"). When the citizens petition for a sewer district and the petition is found sufficient, the City *must* construct the sewer district. The relevant statutory provision regarding the petition method states, in pertinent part:

> ". . . The governing body *shall* cause sewers and/or district water distribution lines to be constructed in each district whenever the record owners of more than one-half (½) the area of the land liable to assessment for said improvements shall petition therefor. Said districts may include mains and submains where the same are within the limits of the district or are necessary outlets or supply lines thereto. *The cost of such district sewers and district water distribution lines*, including said mains and sub-mains, *shall be assessed and collected as hereinafter provided;* the cost of such district sewer shall be assessed and collected as hereinafter provided; . . ." (emphasis added) OKLA. STAT. tit. 11 § 270.6 (Supp. 1977)

In the State of Oklahoma, the prevailing rule of statutory construction is that the word "shall" is mandatory and synonymous with the term "must" allowing no discretion on the part of the person required to act. *State ex rel. Ogden* v. *Hunt*, 286 P.2d 1088 (Okla. 1955); and *Oklahoma Alcoholic Beverage Control Bd.* v. *Moss*, 509 P.2d 666 (Okla. 1973).

The alternative method (resolution method) of creating a sewer district is set out at OKLA. STAT. tit. 11 § 270.8 (Supp. 1977) and provides:

"§ 270.8 District sewer or water lines without petition—Preliminary plans and costs.

"Whenever *the governing body* shall deem district sewers, or district water distribution lines necessary, it may proceed with such work without petition, and *shall*, by resolution, *require the city* or town *engineer*, or other registered professional engineer, *to prepare* and file *preliminary plans, showing a preliminary estimate of the cost of such improvement*, and as assessment plat, showing the area to be assessed. In the event non-contiguous areas are included in the same district, separate preliminary estimates shall be filed as to each area. The governing body shall have the power to adopt any material or methods for the construction of such work." (Emphasis added)

The appellees submit that the statute (OKLA. STAT. tit. 11 § 270.10 (Supp. 1977)) next following the description of the formation of a sewer district without petition (Section 270.8) outlines the procedure necessary to be followed in forming the resolution method district.

" §270.10 Resolution approving plans, estimates and assessment plats—Notice of resolution—Protests.

"*Upon the filing of said preliminary plans, preliminary estimate* and assessment plat, the governing body of such incorporated city or town shall examine the same, and if found satisfactory, shall by resolution adopt and approve the same, and declare such work of improvement necessary to be done. Said resolution shall be published for at least two consecutive Thursday issues, if published in a daily newspaper, or at least two consecutive issues, if published in a weekly newspaper, which newspaper shall be of general circulation in said city or town. Such notice shall further provide that if the record owners of more than one-half in area

of the land to be assessed shall not within fifteen (15) days after the last publication thereof, file with the Clerk of said incorporated city or town, their protest in writing against the improvement, then the incorporated city or town shall have the power to cause such improvement to be made and contract therefor and to levy assessments for the payment thereof; Provided, that after the same shall have been protested by the owners of more than fifty percent of the land liable to assessment the governing body of said incorporated city or town shall not advertise the same again for a period of six months, except on petitions as heretofore provided. In addition to the publication notice prescribed by statute in the creation of a local improvement district or special assessment district by a town, city, county or district, notice by mail shall be given as hereinafter provided: Not less than ten days before the first hearing affecting the proposed district, the town, city, county or district clerk, as the case may be, shall notify each listed owner of land as shown by the current year's tax rolls in the County Treasurer's office, said list to be furnished by the engineer, by mailing a postal card directed to said owner at his last known address as shown by said ownership list, stating the initiation of the proceedings and that the property, describing it, will be liable to assessment to pay for the improvement naming the newspaper and the issues thereof in which the resolution prescribed by statute is to be published and referring the owner to each publication for further particulars. Provided, that failure to receive such notice shall not invalidate the proceedings affecting said district. If several tracts are owned by the same person, all may be included in the same notification. Provided, that in lieu of a mailing of the aforesaid postal card, that said clerk may mail to each of said owners a copy of the newspaper publication which mailing shall be not less than ten days

before the first hearing. Proof of notification shall be made by affidavit of said clerk and filed in his office." (Emphasis added)

Without recapitulating all the constructional analyses relied upon by the Oklahoma Supreme Court and/or submitted by the appellees in construing these statutes to determine if the notice provisions of Section 270.10 apply to districts created by the petition method, we submit only the following. The petition method statute (Section 270.6) states "the cost of such district sewers shall be as hereinafter provided" which leads one quite naturally to OKLA. STAT. tit. 11 § 270.16 (Supp. 1977) entitled "Preparing and filing final statement of costs—Preparing and filing assessment roll," etc. No specific methods are set out for implementing this petition method district.

Conversely, Section 270.8, which permits the formation of a sewer district by direct action of the assessing authority, states that the City may form such a district by preparation of preliminary plans and preliminary estimates. Section 270.10 opens with a reference to those same *preliminary plans*, the publication thereof and the notice provisions. There is no reference to preliminary plans of any kind in Section 270.6, so references in 270.10 must refer back to Section 270.8 and not Section 270.6.

The Supreme Court of Oklahoma in the instant case has construed the above referenced statutes and held that "the language of the statute requiring notice of the passage of such resolutions [Section 270.10] is clearly limited to cases in which a sewer district is created using the non-petition method." (Statutory reference added for clarification and see page A-9 of Appellants' Jurisdictional Statement.)

In this regard it is critical to note that the main case offered by the appellants, *Lance* v. *Sulphur*, 503 P.2d 867 (Okla. 1972), is one in which the assessment district was created by the direct action of city officials. It is therefore, not applicable to the present case. The appellees agree that the publication notice requirements of Section 270.10 are necessary jurisdictional prerequisites when the district is created by direct action of city officials (Section 270.8), but argue that under the petition method (Section 270.6) the finding of sufficiency of the filed petition confers upon the assessing authority all the power and jurisdiction needed to cause the improvement and levy the assessments.

The Supreme Court of the United States has stated that it will accept the construction of a given state's statutes by the highest court of the given state. *Chicago, M. St. P. & P. R. Co.* v. *Risty*, 276 U.S. 567, 570 (1928). The Supreme Court in *Londoner* v. *Denver*, while acknowledging the validity of the construction of Colorado's assessment statutes by the Supreme Court of Colorado, stated in *dicta*:

> ". . . We think it fitting, however, to say that we see nothing extraordinary in the method of interpretation followed by the court, or in its results. Whether we should have arrived at the same conclusions is not of consequence." *Londoner* v. *Denver*, 210 U.S. 373, 379 (1908).

As to the constitutionality of the necessity for notice in the early stages of formation of an assessment district, the Supreme Court has narrowly defined the area which

may be attacked on the ground of lack of due process by holding in *Chicago M. St. P. & P. R. Co. v. Risty*, 276 U.S. 567, 570 (1928):

> "[3] Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if landowners who may be assessed are later afforded a hearing upon the assessment itself. Londoner v. Denver, 210 U.S. 373, 378, 28 S.Ct. 708, 52 L.Ed. 1103; Goodrich v. Detroit City, 184 U.S. 432, 437, et seq., 22 S.Ct. 397, 46 L.Ed. 627; Voight v. Detroit, 184 U.S. 115, 122, 22 S.Ct. 337, 46 L.Ed. 459; Embree v. Kansas City Road District, 240 U.S. 242, 36 S.Ct. 317, 60 L.Ed. 624; Soliah v. Heskin, 222 U.S. 522, 32 S.Ct. 103, 56 L.Ed. 294."

Since the Opinion of the Oklahoma Supreme Court rendered in this case states (See A-11 of Appellants' Jurisdictional Statement): "the parties stipulated that a time and place was set for an assessment as required, that proper notice of the hearing was published and that the property owners involved received notice of the hearing" and said statement is supported in the record by Items 17 through 27 of the original Stipulations contained in the certified record, it is urged that all due process attacks on the procedural steps urged by the appellants are without merit.

We submit that the judgment of the Oklahoma Supreme Court should be affirmed since the questions urged have been so plainly foreclosed by prior decisions of the Supreme Court as to make further argument unnecessary.

QUESTION III

Do prior decisions of the Supreme Court on a given subject deprive a federal question of the necessary degree of substantiality?

The Supreme Court has held in *California Water Service Co. v. Redding*, 304 U.S. 252, 255 (1938):

> "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." [Citations omitted.]

While the appellees do not urge that no federal question exists in this appeal, we do urge that holdings similar to that in the *California Water Service* case, *supra*, namely *Zucht v. King*, 260 U.S. 174 (1922); *Leonard v. Vicksburg*, 198 U.S. 416 (1905); *Missouri Pacific Railway Company v. Ozro Castle*, 224 U.S. 541 (1912) compel the conclusion that the present appeal is one which lacks the necessary substantiality since the previous decisions of this Court foreclose the subject.

CONCLUSION

For the foregoing reasons, either this appeal should be dismissed or the judgment of the Supreme Court of Oklahoma should be affirmed.

Dated this ..... day of ....., 1978.

Respectfully submitted,

WALTER M. POWELL
Municipal Counselor

By: MARION JOWAISAS
Assistant Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Attorneys for Appellees

January, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of January, 1978, three copies of this Motion to Dismiss or In the Alternative to Affirm were mailed, postage prepaid, to Attorneys for Appellants, Bill Pipkin and William C. Leach, 110 West Main, Moore, Oklahoma 73160, and to Buck and Crabtree, Attorneys for M. A. Swatek and Company, 2500 Liberty Bank Tower, 100 Broadway, Oklahoma City, Oklahoma 73102.

.....

WALTER M. POWELL